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COPYRIGHT, LIBRARIES AND THE EUROPEAN UNION

One of perks of my job is the ability to visit Interesting cities and countries. This is my second time In Poland and my first time in Lodz. I am grateful to Barbara and the other organisers of this conference for inviting me to talk to you today. The theme of my talk today is copyright, and in particular, the tension between copyright owners – the publishers – and users.

Copyright always has been, and always will be, a balance between the interests of the copyright owners, and the interests of information users. The owners want to maximise income from the use of the copyright materials. Users want maximum access. Up until the arrival of the Internet, this tension was controlled by technological limitations. There is only so much photocopying you can do in a day, and the quality of photocopies is poor and they are expensive to produce.

In the early days of online Information retrieval, whilst one could download materials, the only realistic way to forward such downloaded materials was by printing out and posting copies of output. The Internet changed all that. Now it is extremely easy to forward high quality copies of copyright materials to thousands of recipients around the world at the press of a button. It costs nothing, the copies are perfect and it is very difficult for the copyright owners to police such activities. Finally there is the problem that different countries have different rules and traditions regarding such actions, and yet such copying often is carried out across national boundaries. The new technology, and in particular the ease with which one can now copy and disseminate the copies, has therefore made that owner-user tension far more acute. The publishers, although showing considerable flexibility in developing licences and new electronic products, are supportive of the moves by the music, film media and software Industries to change the situation.

These industries have adopted a three-way approach to ensuring their products do not get abused. They use all three ways in co-operation with each other.

The first method is to develop technical measures, such as Digital Rights Management systems, to prevent abuse of electronic materials. DRMs include simple things like ID and password access to electronic materials, all the way through to requiring you to enter your credit card details to access materials and encryption of material so only those Issued with the key to decrypt can access the materials. These technical measures, which Laurence Lessig, the noted US law professor who has taken the lead in opposing the strengthening of protection of copyright materials world-wide, simply calls „code" (and indeed, he has

written a book on the topic with that word as its title), are perhaps the single most important measure the copyright owners have adopted. It is still early days for these technical measures; we can expect them to become more common and more sophisticated in the years to come.

The second method the copyright owners have adopted is that of strengthening copyright law. It is this aspect that I will focus on in my talk today.

The third method is to lock users into licences and contracts, so that the only way you can get access to electronic materials is by signing a licence agreement. Unlike your purchase of books and printed journals, licences for access to electronic materials do not give you actual ownership of those electronic materials. If you cancel the licence, all access to the materials may be denied to you in the future. Compare that situation to your purchase of books or journals, where if you subsequently cancel, you still retain ownership of what you had paid for. Furthermore, the licences may well give you only limited permissions to do things with the electronic Information – not as much as you would like to serve your patrons. But often, there is nothing you can do about this, as the copyright owner will refuse to negotiate more generous terms with you.

As you can see, librarians are caught in the middle of a war between users and copyright owners. Since librarians' jobs are to serve their patrons, their sympathies are with the users. But they can do little to help their users unless they learn to understand the copyright owners' concerns and how copyright owners are responding to those concerns.

Copyright in the electronic environment

So what are the ground rules regarding electronic copyright? The first thing to recognise is that other than simple facts, like a URL or an e mail address, single words or short sentences, or material that is out of copyright because it is so old, everything in machine readable form, including digitised images, electronic mail messages, material on the Web, electronic journals, and everything else put up on the Internet is copyright.

Just because it may be widely available free of charge does not change the situation. There is not necessarily an implied licence to copy. Therefore you should be careful about copying such material without permission. However, such copying is only likely to be a real problem if the person who owns the copyright loses income as a result of your infringement, or if you gain income or save costs as a result of the infringement.

Individual URLs, e-mail addresses and so on are facts, and can be copied. Compilations of URLs or e-mail addresses are protected by copyright, by database right, or by both, just as are Internet indexes such as those created by Yahoo.

Is it legal to link to other sites? My own view is that simply placing a link is not infringement, just as the library OPAC telling you it stocks a book is NOT an invitation to you to photocopy it in its entirety and thereby infringe. So just putting a link in is safe. It is less safe to put a title copied over in as well.

What is ***certainly*** unsafe is to copy over more than a title, or to surround someone else's WWW material with your frames. I would also strongly urge caution against creating

deep links, that is to say linking your page to one on a third party site that is not the third party's site home page. This is because there may be policy statements, disclaimers, click-through licences or adverts on the home page that the owner of that page wishes all readers to inspect before going deeper into the site.

There have been a number of court cases in the USA and Europe over such so-called deep linking, with varied results, but nonetheless my advice would be to always ask for permission before deep linking.

Overall, if you wish to copy material that is on the Internet, my advice would be to approach the copyright owners to request permission if what you end up with is going to be sold commercially, but if it is for your own private research, go ahead and copy.

If, however, you plan to redisseminate the material to others or if you plan to load it on your Web site, I advise asking for permission.

Moral Rights

Moral Rights include the right to be identified as the author and the right to object if your material is subjected to derogatory treatment, that is to say it is amended or quoted out of context in such a way that it damages your reputation.

An individual cannot assign Moral Rights to a third party. Thus, even though you may have obtained copyright clearance from the copyright owner, you might have to separately negotiate over Moral Rights with the original creator. The creator may not necessarily any more be the copyright owner because he or she has assigned, or sold, the copyright to a third party, but he or she is still the owner of the Moral Rights.

Recent developments in copyright law

Let me move on to a discussion of some recent changes in copyright law. The pressure for these changes comes from the major music, software and media corporations, and the pressure for such change is taking place in a number of countries simultaneously. I am focussing in this talk on changes that have been passed by the European Union, because all new EU member States have to follow these new laws, and on those changes that most affect librarians.

These changes can be roughly grouped into five areas. Firstly, there is the lengthening the term of copyright to 70 years after the death of the creator rather than 50 years after the creator's death. The EU was the first to implement this change, but the USA soon followed. Secondly, there is the change, again led by the EU, to provide special protection for databases, that is to say, collections or compilations of facts, data or other materials.

The third move is to enhance the protection given to materials in a networked electronic environment by developing a new restricted act, namely the act of communicating information to the public; in other words, you cannot place copyright materials on the Internet or an Intranet without the permission of the copyright owner.

The next change is to make it illegal to tamper with any copyright information on a copyright work, such as „© Charles Oppenheim, 2004", showing authorship, copyright ownership, date of creation or last modification, and terms and conditions of authorised uses. The final change is to make it an offence to try to bypass or deactivate with the intention of infringing any DRM that prevents people from using copyright material, or else meters their use for the purpose of charging them. DRMs include softwares that limit what can be done with the information, for example so that you can only view it on screen.They can also limit the number of times the work can be opened, duplicated or printed.

The real crunch comes in the exceptions to these rights. There is one compulsory exception to copyright that the EU has agreed – that is to say, ALL Member States must allow for it – and that is for temporary caching on a hard drive where the user has no control over this happening. So that is never infringement. Then, the EU allows a long list of OPTIONAL exceptions to copyright.

It is up to Member States to decide on a case-by-case basis whether they wish to avail themselves of one or more of them. This is, of course, very silly, because it means that the ultimate objective – harmonisation of the law across Member States – will not be achieved.

These optional exceptions include copying for private, non-commercial purposes. It also allows for copying for:

in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

The problem is the phrase "publicly accessible" and what sorts of libraries it includes. Other interesting optional exceptions are for:

- reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightsholders receive fair compensation.
- use for the sole purpose of illustration for teaching or scientific research
- uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics
- quotations for purposes such as criticism or review
- use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- use of political speeches as well as extracts of public lectures or similar works or subject matter to the extent justified by the informatory purpose and provided that, whenever possible, the source, including the author's name, is indicated;
- use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries of works not subject to purchase or licensing terms which are contained in their collections;

Remember that these are **optional** exceptions, so it is up to each Government to decide how many of these it wants to use. I have no idea, for example, which of these the Polish Government has decided to implement.

Let us now turn to the protection of technological measures and of rights-management information. As you now know, it is an offence to tamper with either with the purpose of infringing or concealing infringement, but there is an important exception. Rights holders are obliged to try to develop means by which anyone can make use of an exception to copyright even if the item is subject to a DRM. In other words, either the DRM must be intelligent enough to be able to recognise what is, say, private copying use and permit it, or must lower the barrier if any user complains that he or she wishes to access the electronic information for a *bona fide* exception and cannot because of the DRM, or the Government may impose measures to ensure people have access to such protected materials. I can tell you that the UK Government has implemented this part of the EU Directive in a very unsatisfactory way, and I hope that the Governments of the new Member States will be more generous to users in the way that they implement this part of the Directive.

Summing up

Users' needs are simple. They want electronic information, delivered to the desktop wherever they are, even if it is on the move. They want user-friendly search software, and a single portal to do all their searches from. They want to put in a single ID and password to access anything and everything. They want current awareness that gives them exactly what they want and no irrelevant items. They want a choice of titles, abstracts or full text, according to need. They want to be able to hyperlink from one item to another by clicking once on a reference button.

They don't care who supplies the information to them, or from where, and they want seamless links between internal information and external information.

They want to be able to annotate or amend the materials they get, and they want the right to forward it to as many people as they so wish. They are happy enough for the library to set all of this up for them, but they don't want to have to go through the library or into the library to get access. And, of course, they want all of this at no cost to themselves or to their employers. All of this is, of course, a nightmare scenario for publishers and is why they have been pushing the European Union to strengthen copyright law amongst Member States.

Librarians need to be both helpful to their patrons and to ensure that the interests of copyright owners are protected. This is a difficult thing to achieve, and has been made more difficult by the development of the Internet and of broadband networks, which makes it easier than ever to make multiple copies of large files and pass them on to others. The librarians' job has been made even more difficult by the changes to copyright law, which put the librarian in the invidious position of having to restrict further users' access to electronic information.

The European Union's attitude is that it wants a thriving, vigorous and profitable publishing industry because it creates employment, with the not so hidden agenda that it wants a strong publishing industry to counter-balance the strength of the US publishing industry. In doing the industry's bidding by strengthening the law, however, the EU has damaged the traditional balance between owners and users that is inherent in copyright law.

In my view, it is a mistake to strengthen copyright laws. This merely antagonises users more. The correct approach is for rights owners and users, including librarians, to open channels of communication to ensure that the rights owners get a proper reward for their investment, and at the same time, users get realistic access to materials at reasonable cost. The present law suffices as a backdrop to such discussions, and in my view strengthening of the law is unhelpful. Let me give you two examples. As I indicated earlier, it is an offence to by-pass or deactivate a DRM.

I would like to see a balancing offence, namely that it becomes an offence for a copyright owner to refuse to lower a DRM barrier if a user wishes to exercise an exception to copyright, such as a private copying for a non-commercial purpose.

As a second example, I believe the law should state that no licence for electronic information can ever take away users' enjoyment of exceptions to copyright, and no licence can stop users having future access to the electronic materials paid for, even after the contract has ended, and any contractual clause that attempts to restrict users' rights in these ways shall be automatically null and void.

In short, I believe the EU has failed in its aim to harmonise copyright laws because of the long list of optional exceptions it has allowed. It has failed users and librarians by shifting the balance of the law too much in owners' favour. Lobbying CAN influence the EU. There is an EU wide body, EBLIDA, that lobbies on librarians' behalf. I urge all of you to get involved and help EBLIDA in its task.